Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Enforcement of Prohibitions	)	GC Docket No. 92-223
Against Broadcast Indecency	)	
in 18 U.S.C. § 1464	)	

JOINT COMMENTS AND REQUEST FOR STAY PENDING JUDICIAL REVIEW OF ACTION FOR CHILDREN'S TELEVISION, AMERICAN CIVIL LIBERTIES UNION, ASSOCIATION OF INDEPENDENT TELEVISION STATIONS, CAPITAL CITIES/ABC, INC., CBS INC., FOX TELEVISION STATIONS, INC., GREATER MEDIA, INC., INFINITY BROADCASTING CORPORATION, MOTION PICTURE ASSOCIATION OF AMERICA, INC., NATIONAL ASSOCIATION OF BROADCASTERS, NATIONAL BROADCASTING CO., INC., NATIONAL PUBLIC RADIO, PEOPLE FOR THE AMERICAN WAY, POST-NEWSWEEK STATIONS, INC., PUBLIC BROADCASTING SERVICE, RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION, THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND SOCIETY OF PROFESSIONAL JOURNALISTS

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SUMMARY

Congress and the Commission are seeking to impose a 6 a.m.-to-midnight prohibition on the broadcast of supposedly "indecent" material that is virtually identical to the one struck down in Action for Children's Television v. FCC, 852 F.2d 1332 (D.C. Cir. 1988) ("ACT I"). As the Court of Appeals recognized, an indecency prohibition that "stretch[es] to all but the hours most listeners are asleep" cannot adequately protect "the first amendment-shielded freedom and choice of broadcasters and their audiences." Id. at 1335, 1343 n.18. The Court of Appeals reaffirmed in Action for Children's Television v. FCC, 932 F.2d 1504, 1509 (D.C. Cir. 1988) ("ACT II"), cert. denied, 112 S. Ct. 1282 (1992), that a midnight-to-6 a.m. safe harbor "fail[s] to satisfy . . . constitutional standards."

Neither Congress nor the Commission has yet proposed any "reasonable" safe harbor for the broadcast of so-called "indecent" material. Nor has the Commission conducted the "full and fair hearing" into the appropriate scope of indecency regulation that the Court of Appeals mandated four years ago in ACT I. Indeed, the Commission is now seeking to justify the plainly unreasonable midnight-to-6 a.m. safe harbor based on the same methodology (i.e., considering the number of persons under age 18 in the total broadcast audience) that the Court of Appeals has twice rejected. The deficiencies in the Commission's approach were demonstrated in

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the Comments submitted by many of these parties in MM Docket No. 89-494, and we incorporate by reference the arguments and evidence presented in connection with those Comments.

As the Court of Appeals has recognized, the Commission's only valid interest in regulating broadcast indecency is to assist parents in supervising their children's radio and television exposure and to protect unsupervised children from indecent material. ACT I, 852 F.2d at 1343. That interest does not require that indecent programming be prohibited at times when parents or other adults are present in the home to supervise children. We have submitted data demonstrating that opportunities for parental or other adult supervision exist during many hours of the broadcast day outside the midnight-to-6 a.m. period contained in the new legislation.

The Commission has also failed to rectify other deficiencies identified by the Court of Appeals in its approach to indecency regulation. In order to impose sanctions for indecency broadcast outside the safe-harbor period, the Commission must establish that significant numbers of unsupervised children are in the audience for the particular program. In making that determination, the Commission cannot simply assert that young people between the ages of 12 and 17 should be included in the child audience, but must justify its departure from its earlier proposed standard that would have limited regulation to children under age 12.

The proposed indecency regulation presents other constitutional problems as well. The regulation violates the equal protection component of the Fifth Amendment, as well as the First Amendment, by discriminating among broadcasters with respect to the hours at which they may present indecent material. Moreover, for the same reasons raised by many of these parties in ACT I, the Commission's indecency standard is unconstitutionally vague. However, we recognize that this final issue may be one for the Supreme Court, not the Commission or the Court of Appeals, to decide.

Finally, we are requesting a stay pending judicial review that not only continues the current 8 p.m.-to-6 a.m. safe harbor but also prevents sanctions against programs broadcast outside those hours that do not attract an appreciable number of persons under age 12.

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To: The Commission

JOINT COMMENTS AND REQUEST FOR STAY PENDING JUDICIAL REVIEW OF ACTION FOR CHILDREN'S TELEVISION, ET AL.

These Joint Comments and Request for Stay are submitted by a group of commercial broadcasters, public broadcasters, public interest organizations and associations representing broadcasters, journalists, program suppliers, listeners and viewers.[1] Most of these parties were petitioners in Action for Children's Television v. FCC, 932 F.2d 1504 (D.C. Cir. 1991) ("ACT II"), cert. denied, 112 S. Ct. 1282 (1992), and Action for Children's Television v. FCC, 852 F.2d 1332 (D.C. Cir. 1988) ("ACT I").

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[1]Action for Children's Television, Capital Cities/ABC, Inc., CBS Inc., American Civil Liberties Union, Association of Independent Television Stations, Inc., Fox Television Stations, Inc., Greater Media, Inc., Infinity Broadcasting Corporation, Motion Picture Association of America, Inc., National Association of Broadcasters, National Broadcasting Co., Inc., National Public Radio, People for the American Way, Post-Newsweek Stations, Inc., Public Broadcasting Service, Radio-Television News Directors Association, The Reporters Committee for Freedom of the Press, and Society of Professional Journalists.

The comments are submitted in response to the Commission's Notice of Proposed Rule Making (the "Notice"), which was issued pursuant to Section 16(a) of the Public Telecommunications Act of 1991, Pub. L. No. 102-356. Section 16(a) directs the Commission to "promulgate regulations to prohibit the broadcasting of indecent programming" between 6 a.m. and midnight on all commercial radio and television stations and all public broadcasting stations that remain on the air after midnight. The Commission is also to promulgate regulations to prohibit indecent programming between 6 a.m. and 10 p.m. on public broadcasting stations that sign off the air by midnight.

The stay request is submitted pursuant to Rule 18 of the Federal Rules of Appellate Procedure.

INTRODUCTION

This is the third time in the past five years that the Commission has announced new prohibitions on the broadcast of indecent material -- prohibitions that "the United States Court of Appeals for the District of Columbia Circuit has twice invalidated." Notice at 1. In 1988, the Court of Appeals held that a prohibition that, like the one at issue here, extended from 6 a.m. to midnight could not withstand First Amendment scrutiny. ACT I, 852 F.2d 1332. The Court of Appeals reaffirmed that decision three years later in striking down a 24-hour-a-day indecency prohibition. ACT II, 932 F.2d 1504.

In invalidating the two earlier indecency prohibitions, the Court of Appeals instructed the Commission on remand to conduct a "full and fair hearing" as to when indecent broadcasts may properly be deemed "actionable" based on whether a reasonable risk exists of unsupervised children in the audience. ACT II, 932 F.2d at 1510; ACT I, 852 F.2d at 1344. The Commission was directed to consider such issues as (i) the appropriate definition of "children" and "reasonable risk" for purposes of channeling indecent material to certain hours, (ii) the use of "station- or program-specific" data on the numbers of children in particular audiences, and (iii) "the scope of the government's interest in regulating indecent broadcasts." ACT II, 932 F.2d at 1510; ACT I, 852 F.2d at 1341-44.

Although four years have elapsed since the Court of Appeals' decision in ACT I, the Commission has not yet conducted the "full and fair hearing" called for by the Court of Appeals in that case. Yet, the Commission has continued to impose sanctions for allegedly indecent programming presented during hours that may fall within an appropriate safe-harbor period. For example, the Commission recently imposed an unprecedented $105,000 fine on a Los Angeles radio station for allegedly indecent programming broadcast "between approximately 6:00 a.m. and 11:00 a.m."[2]

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[2]Notice of Apparent Liability to Radio Station KLSX(FM) (released Oct. 27, 1992); Paul Farhi, FCC Fines Station $105,000 Over Stern, Washington Post, Oct. 28, 1992, at D1.

Nor has the Commission proposed in this proceeding to conduct the comprehensive inquiry directed by the Court of Appeals. Instead, the Commission has merely stated that, given that Congress has already legislated midnight to 6 a.m. as the appropriate safe-harbor period, "[t]he focus of this proceeding is, thus, quite narrow and will be confined to the matter of updating the Commission's record." Notice at 2.

The midnight-to-6 a.m. safe harbor at issue in this proceeding is wholly inadequate under the First Amendment. The new rule is also constitutionally impermissible because it discriminates among categories of broadcasters with respect to the hours at which they may present programming that the Commission might consider indecent.

I. SECTION 16(a) AND THE COMMISSION'S PROPOSED REGULATIONS ARE CLEARLY UNCONSTITUTIONAL UNDER THE COURT OF APPEALS' DECISIONS IN ACT I AND ACT II

It is well-established that speech that is indecent, but not obscene, is protected by the First Amendment. Sable Communications of California, Inc. v. FCC, 492 U.S. 115, 126 (1989); ACT II, 932 F.2d at 1508; ACT I, 852 F.2d at 1334. The Supreme Court and the District of Columbia Circuit have expressly recognized that indecent material broadcast over the public airwaves is entitled to First Amendment protection. See, e.g., FCC v. Pacifica Foundation, 438 U.S. 726, 746 (1978) (plurality opinion); id. at 763 (Brennan, J., dissenting); ACT II, 832 F.2d at 1508-09. Accordingly, while broadcasters may be required to channel indecent material away from unsupervised children, any such channeling "must be

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especially sensitive to the first amendment interests of broadcasters, adults, and parents." ACT I, 852 F.2d at 1340 & n.12.

The Court of Appeals in ACT I was faced with a 6 a.m.-to-midnight indecency prohibition virtually identical to that mandated by Congress in Section 16(a). The court concluded that such a prohibition was invalid because it barred indecent programming during "all but the hours most listeners are asleep" and "impermissibly intruded on constitutionally protected expression interests." ACT I, 852 F.2d at 1335, 1340-44; ACT II, 932 F.2d at 1505-06. The court acknowledged that the government has a "compelling" interest in "safeguarding the physical and psychological well-being of a minor." ACT I, 852 F.2d at 1343 n.18 (internal quotations omitted). However, said the court, "that interest, in the context of speech control, may be served only by carefully-tailored regulation." Id. The court therefore concluded that the Commission was obligated to adopt "a reasonable safe harbor rule" -- i.e., a rule drafted with "the precision necessary to allow scope for the first amendment-shielded freedom and choice of broadcasters and their audiences." Id. (emphasis added).

The Court of Appeals reaffirmed that conclusion in ACT II, which rejected a 24-hour-a-day indecency ban that had been mandated by Congress. 932 F.2d at 1508-09. The court emphasized that "[w]e found [in ACT I] that the Commission's elimination of the post-10:00 p.m. 'safe-harbor' period failed to satisfy . . . constitutional standards" and that "the

Commission must identify some reasonable period of time during which indecent material may be broadcast." Id. at 1509. The new prohibition on broadcast indecency cannot be sustained in light of ACT I and ACT II.

Nor is the 6 a.m.-to-midnight prohibition supported by the legislative record. An otherwise invalid statute cannot, of course, be validated by legislative findings. Sable Communications, 492 U.S. at 115. Here, however, Congress did not even attempt to reconcile Section 16(a) with the Court of Appeals' decision in ACT I.

There is little legislative history of Section 16(a). No congressional hearings were conducted with respect to this provision. It is doubtful that many members of Congress even recognized that the new 6 a.m.-to-midnight prohibition mandated by Section 16(a) is virtually identical to the prohibition struck down in ACT I. The Senate debate on Section 16(a) consisted solely of statements by two of its proponents: Senator Byrd, who introduced Section 16(a) as a floor amendment to the Public Telecommunications Act, and Senator Helms, who had sponsored the earlier prohibitions on broadcast indecency. See 138 Cong. Rec. S7308-09 (June 2, 1992). Neither statement offered any rationale as to why the constitutional deficiencies recognized with respect to the 6 a.m.-to-midnight prohibition in ACT I are not equally applicable to the prohibition mandated by Section 16(a).

Indeed, these Senators' statements appear to misapprehend the terms of the statute that Congress enacted. Although Section 16(a) is not directed at violent programming, Senator

Byrd's statement focused as much on material involving violence or crime as on indecency. For example, Senator Byrd complained about children's being exposed to television coverage of "the mugging of an unsuspecting victim in a New York subway station" or "sniffing cocaine at a celebrity bash in Hollywood." Id. at S7308. Similarly, Senator Helms's statement complained about both "sex and violence" on television. Id. at 7309. However, Section 16(a) does not impose any restrictions on the broadcast of violent material at any hour of the day.

When the House subsequently considered the Senate amendments to the Public Telecommunications Act, Representative Dingell correctly observed that the 6 a.m.-to-midnight prohibition "is clearly unconstitutional" under ACT I and ACT II. 138 Cong. Rec. H7264 (Aug. 4, 1992). He added that "[w]hat the Byrd amendment will do is force the FCC to undertake a lengthy rulemaking proceeding, at taxpayer expense, that is preordained to fail." Id. at 7266. Yet, noting that few members of Congress would vote against an indecency prohibition in an election year, Representative Dingell urged his colleagues to approve the Public Telecommunications Act notwithstanding the Byrd amendment. Id. No other member of the House addressed the constitutionality of the indecency prohibition.

Hence, as the legislative history reveals, Congress simply ignored the constitutional infirmities in Section 16(a). As in Sable Communications, "the congressional record contains no legislative findings that would justify" a

conclusion that there is "no constitutionally acceptable less restrictive means" than a 6 a.m.-to-midnight prohibition "to achieve the Government's interest in protecting minors." 492 U.S. at 115.

Nor could any such prohibition on indecent broadcasting possibly be justified.

First, any rule that restricts indecent programs to the hours between midnight and 6 a.m. effectively deprives broadcasters and audiences of their freedom to present and receive such programs. As the Court of Appeals has recognized, "most listeners [and viewers] are asleep" between the hours of midnight and 6 a.m. ACT I, 852 F.2d at 1335.[3] It is unrealistic to expect that many adults could, or would, rearrange their lives in accordance with a midnight-to-6 a.m. safe harbor. Even those who did remain in the audience would be denied timely access to important material. For example, a news report that involved arguably indecent material -- such as coverage of an angry demonstration or a celebrated trial -- would lose its sense of immediacy if not broadcast until many hours after the fact.[4] And quality dramatic or satiric

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[3]The audience for the four commercial broadcast networks (ABC, CBS, NBC and Fox) drops sharply after midnight. For example, while 47.0 million adults view network-affiliated stations between 10 p.m. and 11 p.m., only 16.9 million adults do so between midnight and 1 a.m. See Nielsen Television Index (second quarter 1992). Similarly, while 11.7 million adults listen to radio between 10 p.m. and 11 p.m., only 7.4 million do so between midnight and 1 a.m. See RADAR 45 (Spring 1992) (figures based on audience per quarter hour). The audiences decrease still further after 1 a.m.

[4]As many of these parties have argued previously, news and public affairs programs should be entirely exempt from

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programs on mature themes would no longer be economically justifiable if they could be presented only to the small midnight-to-6 a.m. audience. The practical effect of the new prohibition on indecent broadcasting will thus be to "reduce[] adults to seeing and hearing material fit only for children." ACT I, 852 F.2d at 1341 (citing Butler v. Michigan, 352 U.S. 380, 383 (1957)); accord Sable Communications, 492 U.S. at 128.

Second, as the Court of Appeals recognized in ACT I, the government may regulate broadcast indecency only for the purpose of enabling parents to decide what programs are appropriate for their children and to "protect[] unsupervised children from exposure to indecent material." 852 F.2d at 1343 (emphasis added). It is the prerogative of parents, not the government, to decide whether their children are mature enough to be exposed to particular radio or television programs. See id. at 1344 ("the FCC must endeavor to determine what channeling rule will most effectively promote parental -- as distinguished from government -- control").

Congress and the courts have recognized in other contexts, including cable television and telephone dial-it services, that the appropriate inquiry is whether parents have the opportunity to supervise children's access to indecent material, not whether parents actually engage in such

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[4](...continued)
indecency regulation. See Petition for Reconsideration of Action for Children's Television, et al., In re Public Notice Concerning New Indecency Enforcement Standards at 21-22 (filed June 1, 1987).

supervision. See, e.g., Sable Communications, 492 U.S. at 128-31 (telephone); Cruz v. Ferre, 755 F.2d 1415 (11th Cir. 1985) (cable); see also Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, §§ 10, 15.[5] In the Cable Act, Congress did not require indecent programming on cable television to be channeled to particular hours of the day. Apparently, Congress recognized that parents have the opportunity to supervise their children's access to cable by using lockboxes, or refusing to subscribe to particular channels, or simply turning off the television set. It makes no difference that many parents may not, in fact, limit their children's access to cable channels that present material within the Commission's indecency definition or that children are, in fact, in the audience for such programs.[6]

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[5]The Cable Act did impose some restrictions on certain arguably indecent programming on certain channels (primarily leased access channels). But the restrictions are far less sweeping than those imposed on broadcasters. Specifically, the Cable Act requires cable systems (i) to notify subscribers of dates when premium channels that show films rated X, R or NC-17 will be transmitted free to all cable households, (ii) allow subscribers to have the premium channels blocked during that period, and (iii) with respect to indecent programming on leased access channels, to segregate all such programming onto one such channel and to block the channel unless the subscriber requests otherwise. Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, §§ 10, 15.

[6]According to Nielsen surveys, while 7.4 million persons under age 18 are watching the four commercial broadcast networks between 10 p.m. and 11 p.m., an additional 3.1 million are watching basic or pay cable during that period. This age group constitutes approximately the same portion of both the cable audience and the commercial broadcast audience. For example, between 10 p.m. and 11 p.m., persons under 18 amount to 14% of the audience for network-affiliated broadcast

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Similarly, since parents have the opportunity to supervise children's viewing and listening of over-the-air broadcasts during many hours of the day -- regardless of whether they choose to exercise that supervision -- no justification exists for denying adults access during those hours to programming that the Commission might consider indecent. As long as parents or other adults are present in the home with the child, they have the opportunity to prevent the child from using television and radio entirely. They also have the opportunity actively to monitor the child's viewing and listening choices.[7] If parents decide to allow the child to view television or listen to radio outside their immediate presence -- or if they decide not to supervise the child at all -- that is a legitimate decision of the parents that may not be overridden by the government. See ACT I, 852 F.2d at 1343 (observing that the government had disavowed any interest in "act[ing] in loco parentis to deny children access contrary to their parents' wishes").

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[6](...continued)
stations, 14% of the audience for basic cable (excluding over-the-air stations) and 18% of the pay cable audience. Moreover, persons under 18 constitute 19% of the HBO audience, 18% of the Showtime audience and 34% of the MTV audience over the period between 8 p.m. and 11 p.m. See Nielsen Television Index (second quarter 1992); Nielsen Home Video Index, Cable Network Audience Composition Report (second quarter 1992).

[7]As most of these parties demonstrated previously, parents may purchase television sets equipped with devices to block unauthorized access to broadcast stations. These devices serve the same purpose as lockboxes for cable television. See Reply Comments of Action for Children's Television, et al., MM Docket No. 89-494 at 7-8 and Appendix 5 (filed April 19, 1990).

These parties have demonstrated that parents or other adults are present in the home to make those decisions during large portions of the broadcast day. We previously submitted to the Commission a survey conducted by the well-known research firm National Research, Inc., concerning the degree to which children are under the supervision of parents or other adults during the morning and evening hours.[8] These hours (6 a.m. to 10 a.m. and 6 p.m. to 6 a.m.) seemed to be most likely to include any safe harbor that might be appropriate and at the same time included the safe-harbor periods that the Commission itself currently uses and in the past had believed to be appropriate (8 p.m. to 6 a.m. and 10 p.m. to 6 a.m.). The survey used the Commission's definition of "children" (i.e., all persons 17 years of age or younger) -- a definition that we nonetheless believe is impermissibly broad and that results in a significant overstatement of the number of unsupervised "children" at any hour.

The survey shows that opportunities for parental or other adult supervision during both the morning and evening hours are extensive. For example, during the 8 p.m.-to-6 a.m. period currently utilized by the Commission, more than 88% of persons under age 18 are under parental supervision, at school or asleep. The figure rises to 98% with the inclusion of those who are under the supervision of adults other than

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[8]The results of this survey of a demographically balanced national sample of 1,000 homes are part of the record in MM Docket No. 89-494. See Comments of Action for Children's Television, et al., MM Docket No. 89-494 at 32-33 and Appendix C (filed Feb. 20, 1990).

parents. During the 10 p.m.-to-6 a.m. period that constituted the safe harbor in the decade following Pacifica, more than 93% are under parental supervision and 99% are under adult supervision. There is thus no appreciable number of "unsupervised children" to be protected from indecent broadcasts during these periods.[9]

It is irrelevant whether some children may be exposed to indecent broadcasts during these hours. In most such cases, parents have decided either that the child may watch or listen to a particular program or that they will not interfere with the child's radio and television choices generally. Those are decisions that, as the Court of Appeals has made clear, parents are entitled to make. To be sure, some children may gain access to indecent broadcasts against their parents' wishes. But similar risks of unauthorized access exist with respect to other communications media. For example, a child whose parents had decided not to buy a particular publication or to subscribe to a cable service may visit a home where the parents had made a contrary decision. It is clear that such risks do not permit the government to suppress indecent speech in these media. As the Supreme Court has recognized with respect to indecent telephone services, the government cannot prohibit indecent speech merely because

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[9]The survey results demonstrate comparable opportunities for parental or other adult supervision during the morning "drive-time" period. For example, throughout the period from 6 a.m. to 10 a.m., more than 93% of all persons under age 18 are under parental supervision, asleep or at school. The figure rises to 99.9% with the inclusion of those under the supervision of adults other than parents.

"a few of the most enterprising and disobedient young people will manage to secure access to such messages." Sable Communications, 492 U.S. at 130.

Third, while the 6 a.m.-to-midnight prohibition is ostensibly designed to serve "the government's compelling interest in protecting children from exposure to indecent materials," Notice at 1, neither Congress nor the Commission has documented what harm might be prevented by shielding children from broadcast indecency. Indeed, while some people may object to so-called indecent programming, no evidence exists that such programming is harmful to children.

We previously submitted to the Commission a memorandum analyzing the empirical data on this subject that was prepared by Professor Edward I. Donnerstein and his associates Dr. Barbara J. Wilson and Dr. Daniel G. Linz of the University of California at Santa Barbara.[10] In the memorandum, Drs. Donnerstein, Wilson and Linz summarized their conclusions as follows:

> 1. Few studies have been conducted to determine the effects on children up to the age of 18 of exposure to "indecent" materials. Those few studies that have been conducted do not show that such exposure has an effect, and thus do not

[10]The memorandum and the curricula vitae of Drs. Donnerstein, Wilson and Linz were submitted in MM Docket No. 89-494. See Comments of Action for Children's Television, et al., MM Docket No. 89-494 at 16-17 and Appendix A, B (filed Feb. 20, 1990). Drs. Donnerstein, Wilson and Linz are nationally recognized researchers on the psychological effects of television and radio. Dr. Donnerstein presented testimony to the United States Attorney General's Commission on Pornography in 1985 and was a member of the United States Surgeon General's Workshop on Pornography in 1986.

> demonstrate that exposure causes harm, however that term may be defined.
>
> 2. There is serious reason to doubt that exposure of 2-12 year olds to such material has an effect in view of the general sexual illiteracy of this age group and the lack of ability to understand -- and likely lack of interest in -- such "indecent" material.
>
> 3. While adolescents 13-17 years old may understand "indecent" material, they are likely to have developed moral standards which, like adults, enable them to deal with radio and television more critically. Moreover, adolescents are subject to other influences that may mediate any effects that might flow from exposure to such material. In general, studies of adult behavior fail to find any antisocial or harmful effects for materials such as those found by the FCC to be indecent.

As the foregoing conclusions demonstrate, there is simply no basis for concluding that children are harmed by viewing or listening to material that the Commission might consider "indecent." No constitutional justification exists for suppressing such material based on unsupported assumptions as to its harmful effect.

Fourth, even assuming that there are unsupervised children in the overall audience during a particular period, the relevant question is whether there are unsupervised children in the audience for a particular program or station. The Court of Appeals recognized that indecency cannot be prohibited during particular hours based on the presence of children in the total radio or television audience. See ACT I, 852 F.2d at 1341. The court therefore twice directed the Commission to consider the use of "station- or program-